Ali J.: The appellant was the defendant in Johore Bahru Magistrates' Court Civil Action No. 601 of 1965 brought to enforce a judgment obtained by the respondent in another action. The respondent had brought this action against the appellant by virtue of a right claimed under section 80(1) of the Road Traffic Ordinance, 1958. By reason of his failure to appear personally or by advocate on the date fixed for the trial of the action judgment in default of appearance was entered against the appellant on the 24th March, 1966. A little more than a month after this the appellant filed an application to set aside the default judgment. In support of this application there was filed an affidavit by the appellant's solicitor, Mr. N. Ramachandran, who in terms stated that he received instructions from the appellant only on the 23rd March, *i.e.* one day before the date of the trial. It seems clear from this affidavit that the only ground relied upon by the appellant in support of the application to set aside the default judgment was that there was a good defence to the action. The learned magistrate, nevertheless refused the application as the appellant failed to satisfy him that there was good reason for his absence on the 24th of March. At the hearing of this appeal it was conceded by the respondent's counsel that the statement of defence filed by the appellant in the court below *prima facie* shows good defence to the action. In the event the only question requiring determination was whether in the particular circumstances of this case the learned magistrate was right in refusing to set aside the default judgment.

It is abundantly clear from the affidavit of the appellant's solicitor that the appellant made a tangible attempt to defend the action only on the 23rd March, 1966, *i.e.* one day before the date fixed for the hearing of the action. No explanation whatsoever was given for their inability to make arrangements to defend the action earlier. That such an explanation is required is clear from O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, which provides as follows:—

> "Any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence be shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the court shall think fit. Notice of such application shall be given to the opposite party."

In his judgment the learned magistrate referred to this rule and correctly stated that in terms thereof the appellant had to satisfy him not only that there was a good defence to the action but also there was good reason for the absence. As far as the trial magistrate was concerned, he was satisfied that the appellant appeared to have a good defence although the defence statement was filed out of time. But he was not satisfied that the appellant had shown good reason for his absence. On this ground he dismissed the application to set aside the default judgment. In view of the express provisions of the rule already stated I do not think it right to apply the rule of practice adopted by the High Court in a similar matter. In this particular case the appellant is a public limited company whose affairs are managed by responsible officials who knew or ought to have known from the terms of the summons served on them the consequences of a failure to appear and defend the action within the time indicated. If they had a reasonable excuse for such a failure the least they could have done was to swear an affidavit stating the reasons why they could not personally attend court or instruct counsel in time to enable appearance to be made on their behalf. In the event it was not at all surprising for the learned magistrate to reach the conclusion that the application to set aside the default judgment was devoid of merit. For my part I need only say that the appellants have only themselves to blame if they fail in this appeal. It must not be taken too much for granted that because a party has a good defence to an action he can deliberately ignore the rule governing appearance. A rule is designed to regulate the procedure in court and should be complied with. In this particular case the rule itself provides for a relaxation on certain conditions being fulfilled to the satisfaction of the magistrate. The appellant had clearly failed to fulfil one of these conditions and I, therefore, considered that this was not a proper case in which I should interfere.

Accordingly the appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *N. Ramachandran; Harban Singh & Kamil.*

LO FAT THJAN & ORS. v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) February 19, 1968]

[K.L.—Federal Court Criminal Reference No. X.2 of 1967]

Criminal Law and Procedure — Adducing fresh evidence — Report of government chemist insufficient — Whether legally permissible for High Court to call chemist to give oral evidence to supplement report — Criminal Procedure Code (S.S. Cap. 21).

Evidence — Additional evidence — Admission of, on appeal — When allowed.

Dangerous Drugs — Charge of importing — Chemist's report — Whether report can be supplemented by oral evidence — Dangerous Drugs Ordinance, 1952, s. 4(1).

On a reference to the Federal Court on a certificate of a judge of the High Court under section 66 of the Courts of Judicature Act, 1964 as to whether in an appeal to the High Court against a conviction by a

subordinate court on a charge of unlawfully importing Indian hemp contrary to section 4(1) of the Dangerous Drugs Ordinance 1952 where it is found that the report of the government chemist under section 427 of the S.S. Criminal Procedure Code is insufficient it is legally permissible for the High Court to call the chemist to give oral evidence to supplement such report by stating reasons for his findings.

Held: (1) the learned judge gave undue weight to the Indian decisions as to the necessity for reasons being given by the chemist and the instant case was not one where additional evidence should have been called, on the principles stated in *R.* v. *Parks* (7);

(2) there cannot be any general rule of universal application laid down that every report under section 427 of the Criminal Procedure Code stating a finding or conclusion must be supported by reasons. The weight or value of every such report must depend on the report itself and the circumstances of each case. If any party thinks it is in his own interest to impugn it, he may either rely on any inadequacy or infirmity in the report himself or he may require the examiner produced for cross-examination. The option is in his hands and nothing can be fairer. It is not for the judge to assist either party in adducing evidence.

Per Curiam: "We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing *lacunae* in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial."

Cases referred to:—

(1) *Saw Thean Teik* v. *R.* [1953] M.L.J. 124, 125, 126.

(2) *Teoh Soo Tok* v. *Public Prosecutor* [1961] M.L.J. 74, 75.

(3) *Himachal Pradesh Administration* v. *Mt. Shiv Devi* A.I.R. 1959 H.P. 3.

(4) *In Re Marudai* A.I.R. 1960 Mad. 370.

(5) *Suleman* v. *State of Gujarat* A.I.R. 1961 Guj. 120.

(6) *Prabhu Babaji Navle* v. *State of Bombay* A.I.R. 1956 S.C. 51.

(7) *R.* v. *Parks* [1961] 3 All E.R. 633.

FEDERAL COURT.

Edgar Joseph Jr. for the appellants.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: This is a reference on a certificate from the learned judge of the High Court at Malacca under section 66, Courts of Judicature Act, 1964. The point of law involved is whether, in an appeal to the High Court against a conviction by a subordinate court on a charge of unlawfully importing Indian hemp contrary to section 4(1) of the Dangerous Drugs Ordinance, 1952, where it is found that the report of the Government Chemist under section 427 of the S.S. Criminal Procedure Code is insufficient, it is legally permissible for the High Court to call the chemist to give oral evidence to supplement such report.

It arose in this manner. On February, 16, 1967, a motor-vessel arrived in the port of Malacca with a mixed cargo, which included two sacks of Indian hemp, weighing 53 lbs., declared by the master of the vessel as "leaves for smoking with tobacco". The samples he produced were sent to the government chemist at Kuala Lumpur for examination and found to be Indian hemp. The master and his crew of six were charged under section 4(1) of the Dangerous Drugs Ordinance, 1952, convicted and sentenced to 103 days imprisonment, the period they were in custody after their arrest.

The chemist's report was to this effect:—

"I examined the packages submitted and found:

In package 'A' — A polythene bag containing 4.01 ozs. of Indian hemp.

In package 'B' — A polythene bag containing 3.8 ozs. of Indian hemp.

Indian hemp is listed in Part I, First Schedule, section 2 of the Dangerous Drugs Ordinance, 1952."

This report was admitted in evidence by the president of the sessions court, Malacca, under the provisions of section 427 of the (Straits Settlements) Criminal Procedure Code, the counterpart of which is section 399 of the Malay States Code. The trial had been once adjourned, before the close of the prosecution, to secure the attendance of the chemist at the request of the defence. When, however, he duly appeared, counsel for the defence informed the court that this witness was not required for cross-examination, whereupon he was, of course, released. Then it was submitted, in counsel's closing address, that the chemist's report was not in evidence, not being admissible as such as he had been called and affirmed, (though he did not testify) since his report conld not be used as a substitute for his oral testimony. The authority cited for this proposition was *Saw Thean Teik* v. *R.*(1) in which Spencer Wilkinson J. said:—

"I think it is quite clear from the wording of section 427 of the Criminal Procedure Code that under that section a medical officer's report is admissible only if that officer is not called as a witness. When a medical officer is giving oral evidence then of course any notes which he may have made at the time of his examination he can refer to refresh his memory. . . . The report of the Senior Government chemist which was put in was also in my view inadmissible for the reason that he was called as a witness and no notice was given under section 427 of the Criminal Procedure Code of the prosecution's intention to use the report. . . . Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see section 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court, their reports should only be used, if at all, either to refresh memory or as corroboration."

With respect, this experienced judge was clearly right in the view he took of section 427. Counsel, however, was as clearly wrong and he

has not persisted here with his contention that the chemist's report was inadmissible.

He submitted, however, both before Ismail Khan J. and in this court, that the report, as a bare expression of opinion, unsupported by reasons, had no evidentiary value and since it was the only evidence adduced that the leaves were Indian hemp, the conviction was wrong.

One of the cases referred to by Ismail Khan J. in his judgment was *Teoh Soo Tok* v. *Public Prosecutor.*[2] The charge there was for *possession* of Indian hemp. The defence was that, in a sack found floating in the sea, what was certified to be Indian hemp was found mixed up in a "homogenous mass of dried up earth, earth mould, broken twigs and dried up leaves". To quote Rigby J.:—

"It might be that he was in possession of something from which Indian hemp might be constituted or manufactured: but that was not the charge. I agreed with that contention. The Dangerous Drugs Regulations, 1952, make it an offence to cultivate the plant known as Cannabis Sativa or to manufacture, or carry on any process in the manufacture of, a drug — including, of course, Indian hemp. Whatever other offence the appellant may have committed in my view, upon the facts of the case, there was no adequate evidence upon which he could properly be convicted of unlawful possession of 40 lbs. 1 2/5 ozs. of Indian hemp or, indeed, of any ascertained quantity of Indian hemp."

Earlier in his judgment, he had said:—

"No evidence was given by him (the chemist) that they were pistillate as distinct from staminate plants, nor was any test carried out or evidence given by him as to whether or not the resin — assuming they contained resin — had, in fact, been extracted."

This sentence must be read in its own context, and in the light of the facts peculiar to that case. We would make it clear that that case is not an authority for the broad proposition that it was held out to be. It seemed, however, to have raised some doubts in the mind of Ismail Khan J. on a side issue, namely, "Does it carry the implication that if the evidence is contained in a report of the chemist and the chemist is not called for cross-examination, the evidence would have been sufficient? In the present case the chemist's report gives no indication of how he arrived at his finding". The learned judge then went on:—

"There are authorities for the view that if the chemist report alone is to be considered sufficient, it should contain all the information which that officer himself would have been able to furnish if he had been examined as a witness. See, for example, *Behram Sheriar Irani* v. *Emperor*, A.I.R. 1944 Bom. 321, 322 and *Mt. Gajrani* v. *Emperor*, A.I.R. 1933 All. 394. But it is not quite clear what the position is when an incomplete report is tendered in evidence. There appears to be a conflict of authorities on the point."

Reference was made to various Indian cases, namely, *Himachal Pradesh Administration* v. *Mt. Shiv Devi* [3]; *In re Marudai* [4]; *Suleman* v. *State of Gujarat* [5] and *Prabhu Babaji Navle* v. *State of Bombay.*[6] Having examined all of them we are unable to discover any statement of principle which can be said to be of general application. In this state of the Indian decisions, Ismail Khan J. was persuaded to adopt the view expressed in p. 2859 of *Sohoni's* Indian Criminal Procedure Code (15th Ed.) that "it is open to the judge to summon the medical examiner and examine him, in case he felt that his reports were incomplete and thereby satisfy himself that the results stated therein were correct." The learned judge took the view (a) that the chemist's report was *"incomplete only because of the omission to state the reasons for his finding"* and (b) that section 427 empowers the court to call for the examiner to have him examined so that the court could be satisfied that his finding is correct (see *In re Marudai's* case).

In the result the learned judge, though with considerable reluctance, felt compelled to call upon the Government Chemist to give further evidence before himself under the provisions of section 311 of the (Straits Settlements) Criminal Procedure Code which the chemist duly did. The appeal was then dismissed, for the reason that, in the light of such evidence, the judge was satisfied that the leaves were in fact Indian hemp.

The question raised may now be considered. The accepted rule of practice relating to additional evidence on appeal is as restated in *R.* v. *Parks* [7]:—

"The principles on which the Court of Criminal Appeal will exercise its discretion in considering whether to allow fresh evidence to be called on appeal under section 9 of the Criminal Appeal Act, 1907, are as follows: (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) it must be credible evidence in the sense of being well capable of belief, and (iv) the court will after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that eviednce had been given together with the other evidence at the trial."

With the greatest respect, we are of opinion (a) that the learned judge gave undue weight to the Indian decisions as to the necessity for reasons being given by the chemist, and (b) that the instant case was not one where additional evidence should have been called, on the principles stated above in *R.* v. *Parks.* As to the first point, it may be stated, without fear of contradiction, that reasons may or may not be necessary, according to the circumstances of each case. Certain simple facts observed may be wholly sufficient for the examiner to state his conclusion or finding as a straight deduction therefrom. On the other hand, there may be conclusions reached after a series or chain of inferences based on a diversity of facts which at various stages may be so ambiguous as to admit of different interpretations. Therefore, it is our opinion that there cannot be any general rule of universal application laid down that every report under section 427 stating a finding or conclusion

must be supported by reasons. The weight or value of every such report must depend on the report itself and the circumstances of each case. If any party thinks it in his own interest to impugn it, he may either rely on any inadequacy or infirmity in the report himself or he may require the examiner produced for cross-examination. The option is in his hands and nothing can be fairer. It is not for the judge to assist either party in adducing evidence.

As to the second point, we would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing *lacunae* in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial.

In this instance we have also felt it our duty to set right a miscarriage of justice. The charge here was under section 4(1) of the Dangerous Drugs Ordinance, 1952, the offence consisting in the act of importation. The master of the vessel had admitted his own personal responsibility for so doing. The assorted crew of 6, who merely helped in the voyage and had no say affecting their destination, could not be said to be in any way participating in the offence. The doctrine of absolute liability was satisfied by the conviction of the master but the net had been cast so wide that the innocent had also been caught. We have therefore quashed the conviction of all the other six appellants.

Appeal of first appellant dismissed.

Convictions of the other appellants quashed.

Solicitors: *Joseph & Son.*

LIM GAW TEONG & ANOR. v. DANIEL & ANOR.

[O.C.J. (Ali J.) February 24, 1968]

[Muar — Civil Suit No. 147 of 1964]

Negligence — Vicarious liability — Motor accident — Car driven for mutual interest of driver and owner.

Damages — Personal injuries — Loss of future earnings — Shortening of leg by 1½".

The plaintiffs claimed damages in respect of personal injuries sustained by them in a road accident involving a car driven by the first plaintiff and a car driven by the first defendant. The second defendant was made a party to the proceedings by reason of her ownership of the car. The second defendant had agreed to sell the car to the first defendant. At the time of the accident, the car was driven by the first defendant for the purpose of testing it. It was the contention of the plaintiffs that the first defendant was negligent in driving on the wrong side of the road, and that the second defendant was vicariously liable for such negligence.

Held, allowing the claim: (1) the circumstances of the case showed that the first defendant was negligent in dangerously driving on the wrong side of the road when he knew or ought to have known that a car coming from the opposite direction;

(2) the owner of the car was liable for the negligence of the driver as the car was driven partly for the owner's purpose and partly for the purpose of the driver.

Cases referred to:—

(1) *Smith* v. *Moss* [1940] 1 All E.R. 469.

(2) *Ormrod* v. *Crosville Motor Services Ltd. & Anor.* [1953] 2 All E.R. 753.

(3) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.

CIVIL SUIT.

D. A. Devadason for the plaintiffs.

E. Majeed for the defendants.

Cur. Adv. Vult.

Ali J.: This is an action for damages arising from personal injuries sustained by the plaintiffs in a motor accident involving a car driven by the 1st plaintiff and the car driven by the 1st defendant. The 2nd plaintiff was travelling as a passenger in the 1st plaintiff's car. It was common ground that the accident occurred on the 16th June, 1959, at about 11 p.m. on the 1½ milestone Kluang/Batu Pahat Road, and at the time of the accident the 1st plaintiff was driving from the direction of Kluang and the 1st defendant from the direction of Batu Pahat. On the pleadings the case for the plaintiff is that the 1st defendant had negligently encroached on the wrong side of the road while that of the 1st defendant is that it was the 1st plaintiff who had encroached on the wrong side of the road. The 2nd defendant, who is a party to these proceedings by reason of her ownership of the car, has denied that the 1st defendant was her servant or agent.

On the question of negligence the 1st plaintiff's evidence was that at about 1½ miles from Batu Pahat he saw a vehicle coming from the opposite direction travelling in a zig-zag manner. He said that on seeing this he drove his car to the edge of the road to the left but failed to avoid a collision. The police sketch plan establishes beyond doubt that the collision occurred fairly close to the plaintiffs' correct side of the road. The petrol stains and broken pieces of glasses on the road as indicated in the plan fairly confirm or suggest that the accident had occurred in the manner described by the 1st plaintiff. The nature of the damage to his car, as shown in the photographs, further suggests that it was caused by a force coming from the front offside. As the road was 21 feet wide it is reasonable to infer that the 1st defendant had been driving well on the wrong side of the road when it collided with the plaintiffs' car which, as can be seen from the photographs, was a small vehicle. Notwithstanding the effect of the evidence already stated the 1st defendant insisted that the plaintiffs' car had encroached on his side of the road. He did so not because he actually saw what happened but